

Appl. No. 09/147,367  
Amendment dated: April 8, 2006  
Reply to OA of: June 9, 2005

## REMARKS

In an effort to avoid a protracted appeal, Applicant has further amended the claims and submit herewith an RCE to continue the prosecution before the Examiner and to place the application in early condition for allowance. All of the previous claims have been canceled from the application without prejudice or disclaimer and new claims 194 through 203 have been added to the application as fully supported by the specification and claims as originally filed. The claims now remaining in the application are claims 194 through 203. Applicant wishes to emphasize that every effort is being made to overcome the rejections in the outstanding Official Action and to arrive at allowable subject matter. Applicant has rewritten the claims to more particularly define the invention taking into consideration the outstanding Official Action and believes that all the claims now present in the application are in full compliance with 35 U.S.C. 112 and are clearly patentable over the references of record.

In this regard, Applicant wishes to emphasize that the level of one of ordinary skill in the art to which the invention pertains must be taken into consideration. With respect to enablement, experimentation is permissible although undue experimentation is not. As stated on page 6, line 23 of Applicant's specification, as described below in the present invention, a similar immunological response can be obtained only by mixing the antigen with a lipid formulation which contains less complicated lipids having a substantially lower price and which can be formulated on a commercial basis in a very simple way. This is an economical aspect of the present invention.

The rejection of claims 142-193 under 35 U.S.C. 112, first paragraph, because the specification while being enabling for the nasal administration of Diphtheria toxoid or influenza or rota virus antigens in micellar composition containing monoolein and oleic acid, does not reasonably provide enablement for generic monoglycerides and fatty

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acids. This rejection has been carefully considered but is most respectfully traversed in view of the amendments to the claims.

The new claim set includes claims 194-203. These claims are fully supported by the specification as originally filed and as would be interpreted by one of ordinary skill in the art to which the invention pertains. All the previous claims canceled from the application have been canceled without prejudice or disclaimer.

Claim 194 claims a method of enhancing an immune response to an antigen in a human or animal, the method comprising administering to the human or animal by mucosal administration an antigen selected from the group consisting of diphtheria toxoid, influenza and rota virus antigen together with an immune response enhancing effective amount of an adjuvant consisting essentially of:

- i) monoolein
- ii) oleic acid and
- iii) water

wherein the concentration of i) is from 0.1 g to 50 g per 100 ml of water, and the concentration of ii) is from 1 g to 50 g per 100 ml of water, and with the proviso that the percent weight ratio of i) in ii) is between 10 to 90. The amendments are fully supported by the specification as originally, note in particular page 7 and the working examples.

Claim 194 now specifies monoolein, oleic acid and water for the adjuvant, and as antigen diphtheria toxoid, influenza and rota virus. These were indicated to be enabling in the rejection for nasal administration. It is believed that the claims now present in the application obviate the enablement rejection and it is most respectfully requested that this rejection be withdrawn.

The rejection of claims 142-193 under 35 U.S.C. 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter which

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applicant regards as the invention has been carefully considered but is most respectfully traversed in view of the amendments to the claims.

It is most respectfully submitted that the amended claims would only be interpreted in one way as the claim specifies administering to the human or animal by mucosal administration an antigen selected from the group consisting of diphtheria toxoid, influenza and rota virus antigen together with an immune response enhancing effective amount of an adjuvant thereby avoiding any indefiniteness in the claims. Accordingly, it is most respectfully requested that this aspect of the rejection be withdrawn. Moreover, the use of consisting essentially of is entirely consistent with a reasonable interpretation of the claim. The additional materials include do not material effect the properties of the claimed invention. This transitional language is between comprises and consisting of and fairly and accurately defines the claim subject matter. Accordingly, it is most respectfully requested that this aspect of the rejection be withdrawn. All of the rejections under 35 USC 112 have been obviated and these rejections should be withdrawn.

The rejection(s) of claims 142-193 under 35 U.S.C. 103 as being unpatentable over WO 93/06921 by itself or in combination with Amselem, Wright, Koga, Carrano et al. individually or in combination has been carefully considered but is most respectfully traversed.

Applicant wishes to direct the Examiner's attention to the basic requirements of a *prima facie* case of obviousness as set forth in the MPEP § 2143. This section states that to establish a *prima facie* case of obviousness, three basic criteria first must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine the reference teachings. Second, there must be a

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reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations.

The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Section 2143.03 states that all claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988).

Applicant also most respectfully directs the Examiner's attention to MPEP § 2144.08 (page 2100-114) wherein it is stated that Office personnel should consider all rebuttal argument and evidence presented by applicant and the citation of *In re Soni* for error in not considering evidence presented in the specification.

Applicant believes that the previous arguments clearly establishes the patentability of the claimed subject matter over the prior art. As noted previously, one of ordinary skill in the art would appreciate the teachings of WO which in the abstract notes that the particles, especially colloidal particles, comprising an interior phase of a "non-lamellar reverse cubic, intermediate or hexagonal liquid crystal phase or a homogeneous L3 phase, and a surface phase of a lamellar crystalline or liquid crystalline phase, or an L3 phase does not suggest that of the present claim. That is, this disclosure teaches particles comprising monoglyceride, water and a so-called fragmentation agent.

As would be appreciated by one of ordinary skill in the art to which the invention pertains, the particles described in WO 93/06921 are prepared by mixing glycerol

monooleate with water to obtain a cubic phase in the form of a solid gel. To this cubic phase is added a so-called "fragmentation agent" (p. 21, lines 26 - 29), the function of which is to break the gel into smaller particles which still maintains a cubic inner phase, and a surface phase, followed by sonication. In the Examples given in WO 93/06921 is described particles having an inner cubic phase comprising monoglyceride/poloxamer 407/water in the ratio 50/3.5/46.5 wt%, whereas the surface phase of the particles comprises monoglyceride/poloxamer 407/water in the ratio 6.5/4/89.5 wt % (p. 21, lines 15 - 20). A suitable so-called "fragmentation agent" according to the invention described in WO 93/06921 must be a substance, that facilitates the fragmentation of the monoglyceride/water gel into particles having an inner cubic phase.

As known by a person skilled in the art, a monoglyceride preparation may, depending on the purity, contain minor amounts of impurities in the form of diglycerides, triglycerides, glycerine and free fatty acids.

The monoglyceride preparation used in compositions as described in WO 93/06921 posses a high grade of purity and contains 98.8 % monoglyceride and a minor amount of impurities in the form of 1.0 % glycerol, 1.0 % diglycerides and 1.0 % free fatty acids (see page 20, line 29-30).

As the amount of the impurity fatty acid in the monoglyceride preparation does not exceed 1%, there will always be a ratio between monoglyceride to fatty acid in the compositions described in WO 93/06921 of almost 100, i.e. there will always be 100 times more monoglyceride than fatty acid present in the compositions.

On the contrary, Applicant's adjuvant is prepared as follows: 1) monoglyceride and fatty acid are mixed to obtain a liquid mixture, 2) water is added followed by very briefly sonication to obtain a dispersion of monoglyceride/fatty acid particles in water, 3) pH is adjusted. Accordingly, Applicant's adjuvant does not at any point comprise a

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solid cubic phase and such teaching in the prior art does not provide the motivation to arrive at the present invention.

Applicant wishes to point out that the composition described in WO 93/06921 is very different from the presently claimed composition. The following pictures illustrate the difference between the claimed composition and the one from WO 93/06921. A very important issue in the adjuvant composition of the invention is the ratio **between monoglyceride and fatty acid**. Accordingly, the claim reflect the fact, that the total amount of lipids (amount of monoolein + amount of oleic acid) in a preferred embodiment of the invention has to consist of from at least 10 w/w % mono-olein to 90 w/w % oleic acid and up to at the most 90 w/w % mono-olein to 10 w/w % oleic acid. The basis for this amendment is found in the specification on p. 7, line 20-22.

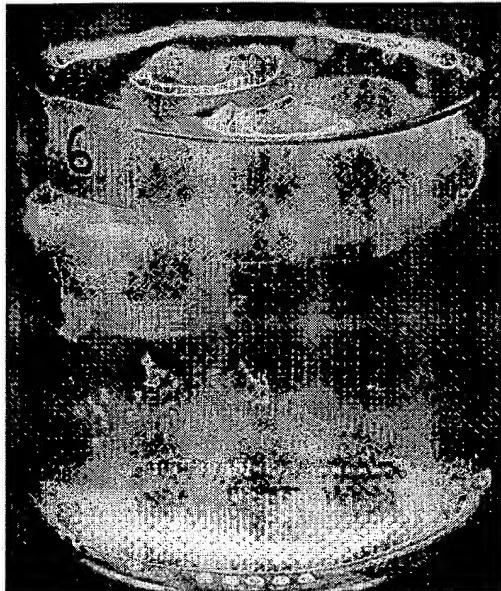
In the composition provided in WO 93/.... the relationship between monoglyceride and fatty acid is 98.8 % monoglyceride and 1.0 % free fatty, whereas the claimed invention has **at least** 90% mono-olein to 10% oleic acid. The following figures tend to illustrate the fact, that a composition comprising only 98.8 % monoglyceride and 1.0 % free fatty like the one described in WO 93/... **can not work as an adjuvant**:

### **Experiment 1:**

A: Mono-olein (**about 98% monoolein+ at the most 1% fatty acid – we are not sure about this, the amount of mono olein may be less - but we have asked the inventors**) at a final concentration of 8% in Tris buffer, showing clearly that no particles are formed without the use of additional substances.

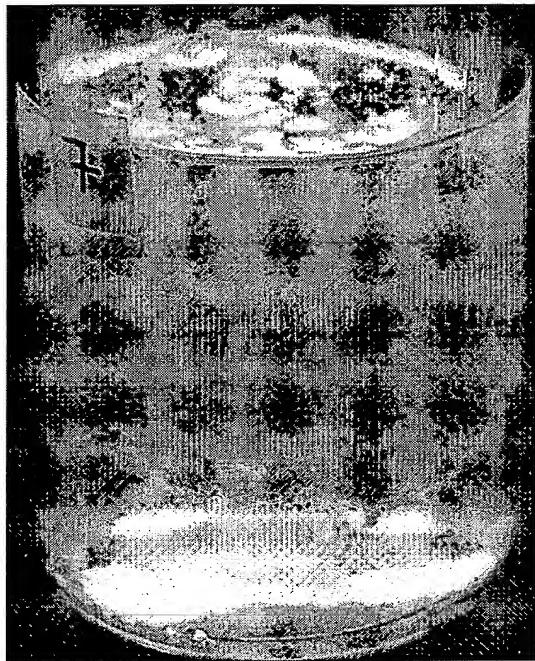
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**B:** Same as above, seen after extensive sonication, still no particles are seen, i.e. mono-olein alone (with an inherent amount of fatty acid) is NOT usable as adjuvant. An additional amount of fatty acid has to be added.

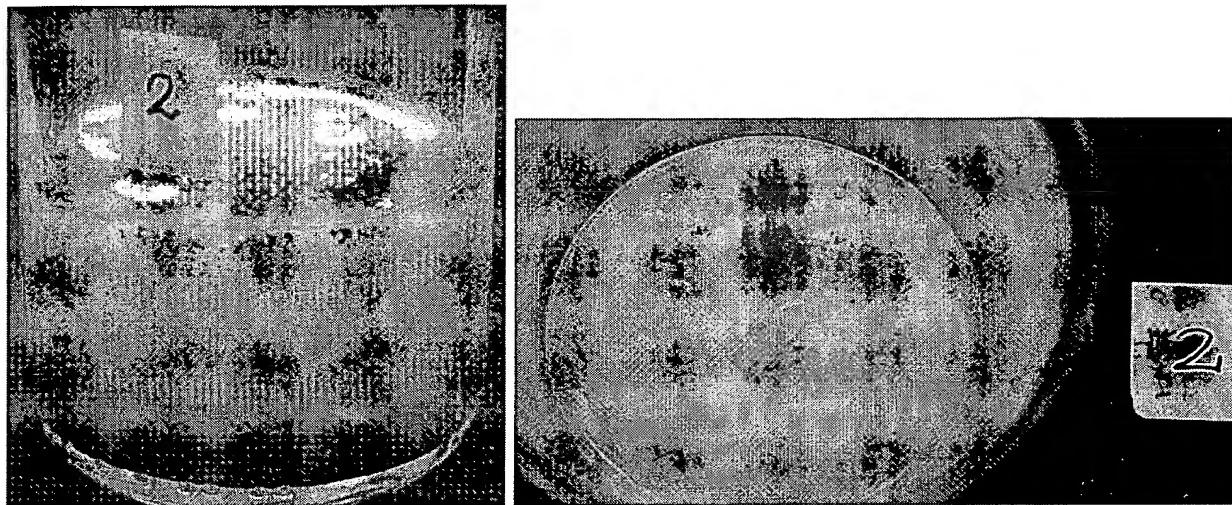
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## **Experiment 2**

Mono-olein which was equilibrated with a 1% solution of oleic acid, resulting in large lumps of mono-olein that has not been dispersed. Not suitable for vaccine purposes.

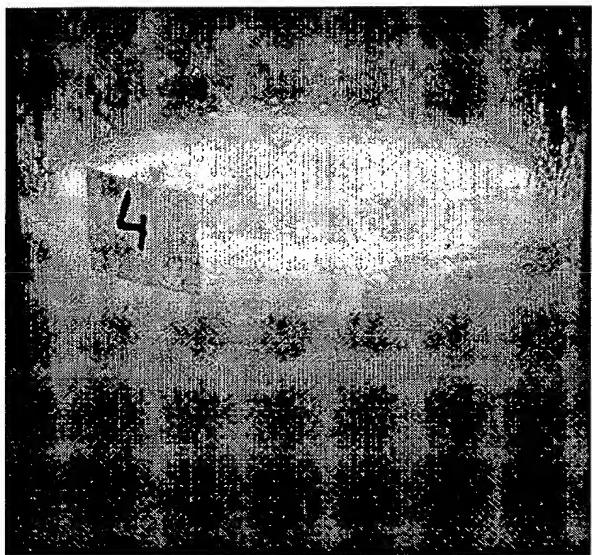
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### **Experiment 3**

Mono-olein (90%) and oleic acid (10%) was mixed, and subsequently sonicated to final lipid concentration of 8%. The sample was slightly mixed just prior to photography, in order to visualize the particles on the wall of the container. The particles formed are relatively large, and indicates that a ratio of at least 10% oleic acid should be used in an adjuvant according to the invention.

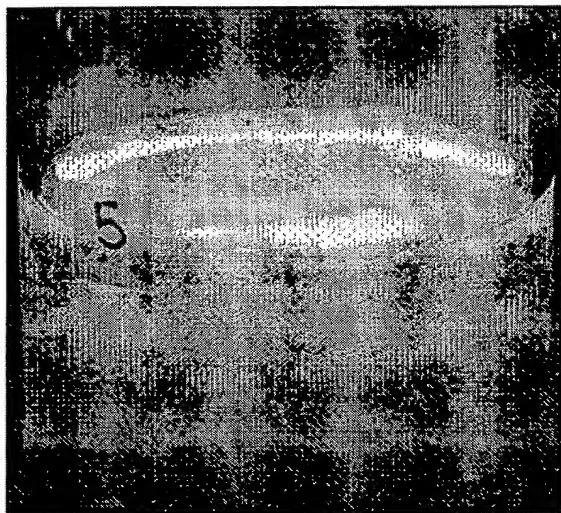
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#### **Experiment 4**

Mono-olein (80%) and oleic acid (20%) was mixed, and subsequently sonicated to final lipid concentration of 8%. The sample was slightly mixed just prior to photography, in order to visualize that **no** particles are seen on the wall of the container. This indicates that at this ratio (with a 20% content of oleic acid), the particles formed are stable.

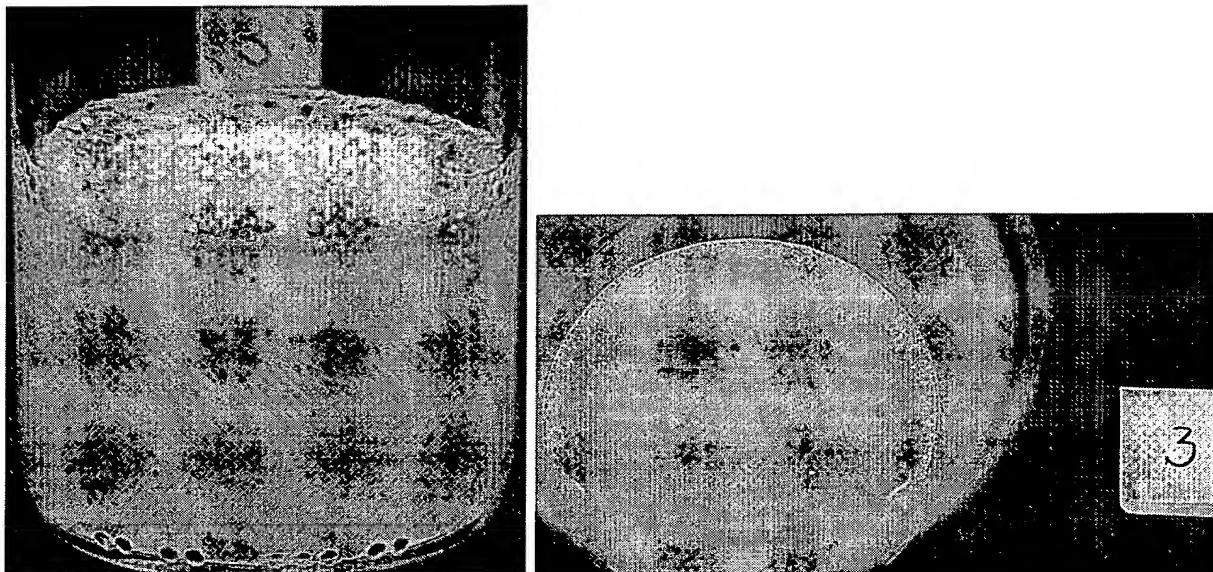
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### **Experiment 5**

A mono-olein gel was made by hydration at a concentration of about 60% over night whereafter a 1% Pluronic was added and mixed overnight. As can be seen large lipid droplets are seen.

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Accordingly, Applicant's adjuvant does not bear any resemblance with the composition described in WO 93/06921, and the fatty acid in Applicant's composition does not bear any functional resemblance with the "fragmentation agent" in WO 93/06921.

More specifically, the adjuvant according to Applicant contains a monoglyceride preparation comprising a minor amount (impurity) of fatty acid, and then an additional amount of free fatty acid together with water while the composition in WO 93/06921 only comprises a monoglyceride with a very small inherent amount (impurity) of free

fatty acid. The amount of monoglyceride in Applicant's adjuvant may vary between 0.1 g to 50 g per 100 ml water, while the amount of free fatty acid may vary between 1 to 50 g per 100 ml water. In other words, the adjuvant claimed in the present invention comprises two distinct components and the total amount of free fatty acid exceeds the amount mentioned in WO 93/06921.

Moreover, the ratio of monoglyceride to fatty acid does not exceed 50, i.e. there may only be up to 50 times more monoglyceride than fatty acid in the adjuvant composition, as compared to the ratio of monoglyceride to fatty acid of 100 described in WO 93/06921. These are all claim limitations which cannot be ignored.

Furthermore, in a preferred embodiment (reflected by claim 143), the ratio of monoglyceride to fatty acid has to be at least 10 w/w % monoglyceride to 90 w/w % fatty acid and up to 90 w/w % monoglyceride to 10 w/w % fatty acid. Accordingly, in a preferred embodiment, there may only be 9 times more monoglyceride as fatty acid, as opposed to WO 93/06921. The lack of teaching of the invention in the primary reference is not overcome by the teachings of any of the references to Amselem, Wright, Koga, Carrano individually or in combination as set forth above, further in view of Isaacs cited before. None of these combinations renders the claims obvious and the necessary motivation to make the changes to the prior art is not found in the prior art but only in Applicant's specification. This represent impermissible hindsight. In re Fritch, 23 USPQ 1780, 1784(Fed Cir. 1992) ("It is impermissible to engage in hindsight reconstruction of the claimed invention, using the applicant's structure as a template and selecting elements from references to fill the gaps.). Each of these combinations, has been carefully considered but is most respectfully traversed.

As noted above, WO 93/06921 describes compositions comprising monoglyceride, water and a "fragmentation agent". Examples of suitable fragmentation agents are e.g. poloxamer 407 (page 20, line 33) and poloxamer 188 (page 22, line 6).

Monoglycerides are available in many grades of purity, starting from 80 % monoglyceride up to 100 %, and accordingly, in many monoglyceride preparations, impurities in form of triglycerides, diglycerides, glycerine and fatty acids are present. In the monoglyceride preparation used in WO 93/06921, having a high purity (98.8%) with respect to monoglyceride, there still are some impurities present in the form of 1.0 % glycerol, 1.0 % diglycerides and 1.0 % free fatty acids (page 20, lines 29-30).

The reason for using a monoglyceride having a very high purity, for the invention described in WO 93/06921, must most certainly be to avoid as many impurities in the preparation as possible, most likely in order to obtain the proper cubic phase. Accordingly, why would a person skilled in the art want to increase the amount of any of these impurities? Clearly, there is no motivation in WO 93/06921 to lead a person skilled in the art to add an additional amount of any of the impurities glycerol, diglycerides or free fatty acids to the composition described in WO 93/06921. Furthermore, there is no indication to, that especially the addition of an additional amount of the free fatty acid impurity should be beneficial in any way, as opposed to the addition of glycerol or a diglyceride.

Furthermore, as explained above, the particles according to WO 93/06921 are prepared by a totally different process than Applicant's adjuvant, and comprise completely different phases.

Accordingly, Applicant submits that WO 93/06921 by itself does not comprise any motivation or incitement to lead a person skilled in the art to vary the amount of the impurity fatty acid in order to obtain an adjuvant composition used in a method according to the present invention.

As mentioned above, in order to obtain the particles in WO 93/06921, a "fragmentation agent" has to be added to the monoglyceride/water. The "fragmentation agent" is chosen from the synthetic agents poloxamer 407 (page 20, line 33) or

poloxamer 188 (page 22, line 6). Another example of a suitable agent is DDAB (page 22, line 36). Further examples of "fragmentation agents" are given on page 19, lines 7-13 (e.g. glycoproteins, polysaccharides, xanthan, PVP and carboxymethylcellulose) Starting from WO 93/06921 a person skilled in the art might be motivated to search for other "fragmentation agents". However, there is no indication in WO 93/06921 that an alternative "fragmentation agent" may be found among any of the impurities of the monoglyceride used for the compositions in WO 93/06921. Furthermore, according to information from Ulf Schröder, founder and CSO of Eurocine, it is not possible to obtain an adjuvant composition as described in US 09/147,367 by adding oleic acid to the cubic phase monoglyceride/water solid gel according to the method described in WO 93/06921.

The four publications described in details below all mentions the fatty acid oleic acid as one component out of many in a formulation. No monoglycerides are mentioned in any of the formulations in the four publications, i.e. there are no indications in any of the four prior references, that the oleic acid mentioned in these could be formulated together with monoglyceride, and there is no teaching in any of the references of an additive effect, or the use of oleic acid as a "fragmentation agent". Starting from WO 93/06921 and wanting to find alternative "fragmentation agents" for use in the compositions, none of the four references comprises any indications of that oleic acid would be a suitable choice.

Moreover, none of the references teach that the total fatty acid content should exceed 1% (w/w) in a suitable adjuvant, let alone specifically recited amounts or ratios.

Anselem describes vaccine compositions that are nanoemulsions of particles having a lipid core, which is surrounded by at least one phospholipid bilayer (emulsomes). The compositions described in Anselem comprise at least 5 different components besides fatty acids. The emulsomes further comprises a high content of

phospholipids. In the description is mentioned that the lipid compositions suitable for use as the lipid core of the emulsomes may be triglycerides, ester of monounsaturated fatty acids, monoester of fatty acids, cholesterol and cholesterol esters and that the lipid cores may further comprise antioxidant. It is also mentioned that negatively charged lipid molecules such as oleic acid may be added to the lipid phase of the emulsomes to increase the zeta potential of the composition. The emulsomes does not comprise any monoglycerides.

Again, there is no indication in Anselem of fatty acids being an obvious choice to formulate together with monoglycerides in an adjuvant. When reading the teaching of WO 93/06921 and Anselem, there are in our opinion no indications that would lead person skilled in the art to pick out the monoglyceride component of WO 93/06921 and the fatty acid component of Anselem and combine these. Starting from WO 93/06921 searching for an alternative fragmentation agent, Anselem contains no indication at all of, that oleic acid would be a suitable choice.

Wright teaches an oral preparation useful as a vaccine against gram-negative bacterial infection. The gist of the invention is the use of a lipid vesicle preparation comprising a masking agent, which disguises the fecal-like smell of the bacteria. The preparation comprises a number of different substances, such as glycerol monostearate, soya steroler, soybean oil, cherry or peppermint oil, polysorbate 60, oleic acid and water. The function of oleic oil in the composition is not described. In the Examples is mentioned a composition comprising 0.1 % oleic acid, i.e. a very small amount of oleic acid as compared to the amounts used in Applicant's adjuvant.

Oleic acid is only mentioned as one component among many, and its function in the composition is not described. Accordingly, starting from WO 93/06921 searching for an alternative "fragmentation agent", in our opinion there is no indication what so ever in the Wright application to lead a person skilled in the art to pick out especially

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oleic acid as an obvious choice for use together with a monoglyceride/water gel as a "fragmentation agent".

Furthermore, the concentration of oleic acid in the composition of Wright is only 0.1 % - which is much less than the amount used in the invention according to Eurocine, and even less than already present in the monoglyceride used for the composition in WO 93/06921. Applicant submits that one of ordinary skill in the art would see that the small amount of oleic acid used does most certainly not render it the first, obvious choice to combine with the teaching of WO 93/06921.

Koga describes a vaccine for dental caries. The main aspect of the patent is the preparation of a protein antigen from *Streptococcus mutans*. The patent describes a vaccine comprising a protein antigen formulated together with carriers, diluents or other additives. As one component among the vast number of additives mentioned is mentioned oleic acid as an adjuvant fat-soluble component. Furthermore glycerin (glycerol) is mentioned as a suitable humectant.

Again, Applicant finds that oleic acid is only mentioned as one component among many, and in Applicant's opinion there is no indication in the application that the specific component oleic acid are a suitable choice for use together with monoglyceride in an adjuvant composition. The only common feature between WO 93/06921 and Koga is that both documents mentioned that fatty acid may be present in an adjuvant (as an impurity in WO 93/06921 and as fat-soluble component in Koga). However, both documents also mention that glycerol may be present. Starting from WO 93/06921 searching for an alternative "fragmentation agent" Koga comprises no motivation at all to lead a person skilled in the art to choose oleic acid.

Carrano describes a method of introducing genetic material into a cell. The genetic material is distributed together with a genetic vaccine facilitator (GVF) agent that

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is selected from anionic lipids, enzymes, saponins etc. Oleic acid is mentioned as an example of a GVF.

The GVF consists of only one component. Furthermore, the genetic material/GVF is not intended for mucosal administration.

Oleic acid is mentioned as one example of an anionic lipid. Glycerol, one of the other impurities of the monoglyceride used in WO 93/06921 is also mentioned as an example of a suitable GVF agent (column 18, lines 38-47).

In Applicant's opinion it would not be obvious to combine the teaching of Carrano, that describes a one-component system for non-mucosal use for the administration of genetic material wherein oleic acid/fatty acids and glycerol are mentioned as two examples of components out of a vast number of components with the teaching of WO 93/06921, since we do not find any references or indications for doing so. Moreover, there is no indication at all to why oleic acid should be chosen instead of e.g. the other impurity of monoglyceride, glycerol. A person skilled in the art searching for an alternative fragmentation agent for use in the compositions described in WO 93/06921 would find no motivation in Carrano to add oleic acid as a fragmentation agent.

All four references mentioned above taken together may have the mentioning of oleic acid in common. However, oleic acid has no common function in the four references, as e.g. a "fragmentation agent". Accordingly, even though oleic acid is mentioned in all four references, there is no motivation to why a person skilled in the art should chose oleic acid as an alternative to the "fragmentation agents" mentioned in WO 93/06921. Furthermore, as described above, the addition of oleic acid to the cubic phased monoglyceride/water solid gel would not lead to an adjuvant as described in US 09/147,367.

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WO 93/06921 in combination with Amselem (US 5,716,637), Wright (5,730,989), Koga (5,352,450) and Carrano (5,739,118) individually or in combination, further in view of Isaacs.

Item 3. The examiner rejects claim 92-141 in view of WO, Amselem, Wright, Koga, Carrano and Isaacs. According to the Examiner Isaacs teaches the effectiveness of the combination of a monoglyceride and a fatty acid in killing viruses and bacteria. Furthermore, he believe that one skilled in the art would be motivated to add a fatty acid to the formulations of WO since fatty acids are also effective against viruses as taught by Isaacs.

Applicant believes that Isaacs is related to antiviral and antibacterial compositions consisting of fatty acids and monoglycerides. We find that the Isaac patent described a totally different invention, since the Isaacs patent concerns a formulation for killing viruses and bacteria - not a method for enhancing an immune response by administering an adjuvant formulation together with an antigen. Therefore, the fact that fatty acids are also effective against viruses are not important at all for the preparation of an adjuvant composition. As we see it, it would not be obvious for a person skilled in the art to combine the teaching, since the technical fields are not related at all. Starting from WO 93/02691 searching for an alternative fragmentation agent for use in an adjuvant a person skilled in the art would not look to Isaacs as this patent is related to the field of compositions with antiviral and antibacterial effect, and not to methods for enhancing an immune response by the administration of adjuvants. Accordingly, it is most respectfully requested that this rejection be withdrawn.

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In view of the above comments and further amendments to the claims, applicant respectfully requests reconsideration and allowance of all of the claims which are currently pending in the application.

Respectfully submitted,

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